

LAWRENCE W. BIERLEIN  
DOUGLAS M. CANTER  
JOHN M. CUTLER, JR.  
ANDREW P. GOLDSTEIN  
STEVEN J. KALISH  
RICHARD D. LIEBERMAN  
HARVEY L. REITER

OF COUNSEL  
WILLIAM I. HARKAWAY  
KAREN R. O'BRIEN  
DANIEL J. SWEENEY

~~DOCKET FILE COPY ORIGINAL~~  
MCCARTHY, SWEENEY & HARKAWAY, P.C.  
SUITE 600  
2175 K STREET, N.W.  
WASHINGTON, D. C. 20037  
(202) 393-5710

**ORIGINAL**  
FACSIMILE  
(202) 393-5721  
E-MAIL  
MSH@MSHPC.COM  
WEBSITE  
HTTP://WWW.MSHPC.COM

July 5, 2000

**RECEIVED**  
JUL 5 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, S.W.  
Room TW-204B  
Washington, DC 20554

CC Doc Ket No. 00-220

Re: Petition of Amigo.Net for Declaratory Order Under  
Sections 253 and 257(b) of the Telecommunications  
Act of 1996 and Request for Expedited Treatment

Dear Ms. Salas:

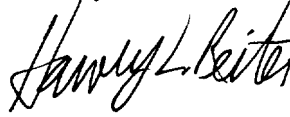
Enclosed are an original and six copies of a petition by Amigo.Net ("Petitioner"), pursuant to Section 1.2 of the Commission's Rules, requesting the Commission to issue a declaratory ruling finding that the Contract awarded by the Colorado State Department of Personnel, General Support Services, Telecommunications Services, Colorado Information Technology Services ("Colorado") to US West and the state process that led to the contract, are inconsistent with sections 253 and 257(b) of the Telecommunications Act of 1996 (the "Act"). Petitioner also requests the Commission to enjoin performance of the contract pending consideration of this petition, given the potential for irreparable harm absent a stay, coupled with expedited action on the petition.

As discussed below, the contract, reflecting Colorado's requirement that a single contractor (1) develop 70 statewide Aggregated Network Access Points (ANAPs) and charge a uniform statewide rate for ANAP services (advanced telecommunications services such as DSL, T-1, frame relay, etc.), irrespective of the typically higher costs associated with building and operating ANAPs in rural areas, eliminates potential competition in the provision of ANAP services and artificially lowers the price of ANAP services in rural areas below their actual cost, preventing smaller telecommunications providers like Amigo.net from competing even though they are otherwise able to offer such services economically.

Amigo.Net, a rural telecommunications provider, urges the Commission to treat this application on an expedited basis, as implementation of the contract and

commencement of construction would foreclose competition and irreparably harm Amigo.Net and other similarly situated companies.

Sincerely,

A handwritten signature in black ink, appearing to read "Harvey L. Reiter". The signature is written in a cursive, flowing style.

Harvey L. Reiter

Counsel for Amigo.Net

Enclosure

cc: Lawrence Strickling  
Michelle Carey  
Debra Werner, Esq.

G:\amigonet\plead\cover letter for Amigonet petition

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon:

Larry E. Trujillo, Sr  
Executive Director  
Colorado Department of Personnel/General Support Services  
1525 Sherman St., 2nd Floor  
Denver, CO 80203

Qwest Communications International Inc  
1801 California Street  
Denver, CO 80202

Dated at Washington, D.C., this 5th day of July, 2000.

  
\_\_\_\_\_  
Harvey L. Reiter

2175 K Street, N.W., Suite 600  
Washington, D.C. 20037  
(202) 393-5710

Amigonet\plead\CERTIFICATE OF SERVICE

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re Petition of )  
 )  
AMIGO.NET )  
 )  
For Declaratory Ruling Regarding the Effect )  
of Sections 253 and 257 of the Telecommunications )  
Act of 1996 on an Agreement )  
for Multi-Use Network: Infrastructure )  
Development, Statewide Telecommunications )  
Service Aggregation, and Network Management )

CC Docket No. 00-220

To: The Commission

**PETITION FOR DECLARATORY RULING AND INJUNCTION PENDING RULING**

Amigo.Net ("Petitioner"), by its attorneys and pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. §1.2 (1998), hereby petitions the Commission to issue a declaratory ruling finding that the Contract between the Colorado State Department of Personnel, General Support Services, Telecommunications Services, Colorado Information Technology Services ("Colorado") and US West and the state process that led to the contract, are inconsistent with sections 253 and 257(b) of the Telecommunications Act of 1996 (the "Act"). Petitioner also requests the Commission to enjoin performance of the contract pending consideration of this petition. As discussed below, the contract, reflecting Colorado's requirement that a single contractor (1) develop 70 statewide Aggregated Network Access Points (ANAPs) and charge a uniform statewide rate for ANAP services (advanced telecommunications services such as DSL, T-1, frame relay, etc.), irrespective of the typically higher costs associated with building and operating ANAPs in rural areas, eliminates potential competition in the provision of ANAP services and artificially lowers the price of ANAP services in rural areas below their actual cost,

preventing smaller telecommunications providers like Amigo.net from competing even though they are otherwise able to offer such services economically.

## **I. Background**

In February, 1998, the State of Colorado's Information Management Commission issued its *Colorado Strategic Plan for Statewide Telecommunications Infrastructure* (Attachment A), a plan that has formed the predicate for subsequent legislation funding state lease arrangements with ANAP service providers in a multi-use network (MNT) and for the so-called Beanpole Bill to create a Community Incentive Fund (CIF) that would help fund community connections to the 76 (now 70) state ANAPs as "anchor tenants" for local ANAPs. The theory behind this two-pronged effort was that (1) the state could encourage wider deployment of advanced telecommunications technology by aggregating the purchasing power of various governmental agencies -- schools, government offices, etc. -- if it acts as a single purchaser -- and (2) that the "seed money" from the CIF would boost the ability of local communities to act as anchor tenants for local ANAPs that would be connected to the State ANAPs.

As noted in the Fact Sheet published by the State (Attachment B), the MNT concept was developed in response to legislation passed by the General Assembly of the State of Colorado in 1996. The intent of SB 96-102 was to connect urban and rural communities across the state. From the start, the development of a public/private partnership was central to the concept of a MNT. The mandate for infrastructure development is aligned with local economic development based on the availability of advanced telecommunication services. SB 96-197 refers to the selection and operation of a Multiple-use Network. This is defined as a digital network capable of carrying integrated voice and video as well as text, graphics, and other electronic data between and among schools, public libraries, institutions of higher education, and state agencies. The bill

mandated that the State investigate and select one or more multiple-use networks to accomplish this.

Amigo.Net agreed with these laudable objectives and, when the State announced the beginning of a process that would lead to the issuance of a request for proposal (RFP), its president, Mr. Swinehart attended several meetings the state scheduled to discuss its plans. One of those meetings, held in July, 1999 was in Alamosa, where Amigo.Net's offices are located. At that meeting, the State's representative, Mr. Borrego, indicated the State's intentions to award a contract to a single contractor for all of the statewide ANAPs. Moreover, he added, ANAP telecommunication services under the contract would be priced at a flat statewide rate. In response to these statements, Mr. Swinehart made several observations.

First, he pointed out that there was no reason why the State needed to enter into a single telecommunications contract to take advantage of aggregation of load. Nor, he added, if the State found it easier to administer a single contract, was there any reason why that contract could not separately obligate individual companies to construct and operate individual ANAPs under the terms of a master contract.<sup>1</sup> Indeed, under the related "Bean Pole bill," § 24-30-903 of Colorado's Revised Statutes, the executive director of the Department of Personnel is expressly obligated to ensure that, "to the extent possible and if technically feasible" bidding and contract award methods for telecommunications services under the 23-11-104.5 CRS (the Community-

---

<sup>1</sup> Indeed, the RFP that later issued contemplated the award of an Indefinite Delivery, Indefinite Quantity (IDIQ) contract, a type of contract that is particularly amenable to multiple awards. The Federal Acquisition Regulations, in fact, establish a preference for multiple awards of indefinite quantity contracts absent evidence that selecting only a single provider would be feasible and more efficient. See 48 C.F.R. § 16.504(c). Colorado has made no inquiry to establish that it would be inefficient to award contracts for multiple ASAP providers. Mr. Swinehart's affidavit shows the opposite to be true.

based Access Grant Program) “should be structured in a manner as to allow the greatest number of providers to participate in the awarding of the contract.”

Second, Mr. Swinehart stated that there was no sound economic reason why the price of service from the State ANAPs should be uniform. On the contrary, he said, it would result in a subsidy to rural areas and foreclose telecommunication suppliers who could serve rural areas economically without a subsidy. Amigo.Net, he stated, had been providing DSL and wireless service to rural customers and was an example of such a telecommunications provider. To use the language of the Bean Pole bill, the uniform rate requirement would not “allow the greatest number of providers” that would be “technically feasible.”

Following up on the Alamosa meeting, Mr. Swinehart wrote Mr. Borrego a letter on July 26, 1999 seeking confirmation of the State’s intentions:

Mike,

I wanted to clarify a statement you made at the Alamosa meeting. I think you said whomever gets the RFP bid for the MUN will be required to provide the same service for the same price throughout the State. In other words the price in Alamosa will be the same even though it will cost more to provide than in Denver.

If this is what the State plans to do I don't see how it would withstand a legal challenge. The PUC has ruled against this type of subsidy and it would be contrary to the intent of the Telecom Act.

Please clarify if this is the State's position. If this is the case, this would be the worst case policy for rural Colorado. Thanks ahead of time for your clarification on the issue. Ks

Attachment 3.

A day later, Mr. Borrego, Communications Manager for Colorado

Information Technology Services, wrote back as follows:

We will be asking for flat rate pricing. I don't agree that it will be bad for rural Colorado or is contrary to the telecomm act. In fact flat rate pricing

already exists for certain types of advanced services like frame relay and ATM. The PUC rulings only deal with basic telephone service that are under FCC or PUC regulation. Advanced services like ATM are unregulated. Flat rate pricing could be the only way that the rural areas can afford advanced services.

#### Attachment 4.

On October 22, 1999, the Colorado State Department of Personnel, General Support Services, Telecommunications Services, Colorado Information Technology Services ("Colorado") finally issued its Request for Proposal ("RFP") for Multi-Use Network: Infrastructure Development, Statewide Telecommunication Service Aggregation, and Network Management, Solicitation RFP-TK-00011-00. Attachment 5. As expected from Mr. Borrego's remarks, the RFP called for the development of 70 statewide ANAPs and contemplated that Colorado would enter into a single contract, with either one successful bidder or a consortium (consisting of a Prime Contractor and Sub-Contractors) to develop the ANAPs. (RFP at 28) The state also encouraged the successful bidder to charge a uniform statewide rate for the ANAP service. RFP at 27.<sup>2</sup>

Notwithstanding Amigo.Net's subsequent protests, the State proceeded with the procurement and, in early April announced that it had entered into an agreement with USWest under which USWest, as prime contractor, would alone provide the ANAP services (DSL, Frame-Relay, ATM high speed data access and advanced Internet Protocol services) at a uniform statewide rate. Attachments 2, 6 and 7. In a story that ran in the April 9, 2000 edition of the Pueblo Chieftain, Colorado's Governor Owens reiterated what Mr. Borrego had said to Mr. Swinehart months earlier -- that "a statewide high-speed Internet system is needed now and that

---

<sup>2</sup> While in later conversations between Mr. Swinehart and State officials the State explained that it was not insisting on flat rate pricing, it also made clear that flat rate pricing would be preferred. Attachment 8, Affidavit of Mr. Swinehart. Not surprisingly, the winning bidder (US West) did, in fact, offer a flat rate pricing scheme. Attachment 9.



rural areas can't wait for small companies to supply service." Pueblo Chieftain, April 9, 2000, page 1.

## **II. Legal Framework**

The Telecommunications Act of 1996 was enacted by Congress to expand competition in telecommunications services, and, in particular, "to accelerate deployment of advanced telecommunications services to all Americans by opening all telecommunication markets to competition." S. Conf. Rep. No. 104-239 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 1 (1996) (quoted in In the Matter of New England Public Communications Council Petition for Preemption Pursuant to Section 253 (New England Preemption Order), 11 FCC Rcd. 19713 ¶ 9 (1996)). Three aspects of the Act, in particular, bear on the RFP process that concerns Amigo.Net.

First, while the Act emphasizes the importance both of universal service and of affordable telecommunications service in rural communities, it also directs the Federal Communications Commission, as the FCC put it, to "create secure and explicit mechanisms to achieve universal service goals." Access Charge Reform, First Report and Order, 7 Comm. Reg. (P & F) 1209 at ¶ 35 (1997). In other words, the FCC is to bring rate structures "into line with cost-causation principles, phasing out significant implicit subsidies" and "promote the public welfare by encouraging investment and efficient competition, while establishing a secure structure for achieving the universal service goals established by law." Id.

Second, the Act adds a new Section 253(a) to the Communications Act, barring states and local governments from enacting legislation or establishing legal requirements that impede entry into intrastate or interstate telecommunications service:

- (a) No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The bar in Section 253(a) is subject to the qualification in Section 253(b) that nothing in Section 253

shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications service and safeguard the rights of consumers.

While the bar in Section 253(a) is not absolute, the Commission has made clear that, even if some competitive limitation may qualify as “necessary” to “safeguard the rights of consumers,” the limitation chosen cannot be “necessary” within the meaning of Section 253(b) if it is merely “useful”. The restriction, for example, cannot be “necessary” if it is the “most restrictive means available” to protect consumers. In the Matter of New England Public Communications Council Petition for Preemption Pursuant to Section 253 (New England Reconsideration Order), 12 FCC Rcd 5215 ¶ 5 (1997).<sup>3</sup>

Where a company believes itself aggrieved by a state or local law or requirement under Section 253(a), it can petition the FCC under Section 253(d) to declare the state or local competitive impediment unlawful:

- (d) If, after notice and opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

---

<sup>3</sup> It would seem logical moreover, that a competitive restriction is not “necessary” to protect the rights of consumers if there are less restrictive alternatives available to the State or locality. Other regulatory agencies have, in fact, adopted a “least competitively restrictive alternative” test to measure the reasonableness of competitive limitations. See, e.g. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 243-246 (1968); Florida Power & Light Co., 8 FERC ¶ 61,121 (1979).

Finally, the 1996 Act adds a Section 257 obligating the FCC to establish regulations to “eliminate entry barriers for entrepreneurs and other small businesses.”

#### SEC. 257. MARKET ENTRY BARRIERS PROCEEDING.

- (a) **Elimination of Barriers:** Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.
- (b) **National Policy:** In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

In its order implementing Section 257, the FCC acknowledged that while “there may be legitimate efficiency reasons that favor large-scale operation,” it was obliged to eliminate impediments to entry of small businesses that “significantly distort the operation of the market and harm consumer welfare.” In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 7 Comm. Reg. (P&F) 1112 (1997). The FCC made clear, moreover, that it would look, not only at possible impediments created by its own regulations, but that it would read Section 257 in tandem with its obligation under Section 253 “to preempt state or local requirements that have the effect of prohibiting the ability of *any* entity to provide any telecommunications service.” Id. (emphasis added). “The policy objectives set forth in the 1996 Telecommunications Act, in particular section 257(b),” the FCC stated, “make clear that the Commission must endeavor to promote a marketplace in which decisions to diversify into various segments of the telecommunications marketplace are driven solely by sound business judgment, not regulatory constraints.” Id. at ¶ 107.

**III. The contract between Colorado and US West falls within the scope of Section 253(a) because it affects the provision of telecommunications services and creates a legal requirement.**

As noted earlier, Section 253(a) of the Act provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” The Commission has explained that it must determine whether the state or local legal requirement rises to the level of review under the Act and has the effect of prohibiting the provision of any telecommunications service. New England Preemption Order, 11 FCC Rcd. 19713 (1996); In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on and Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way (Minnesota Petition), 14 FCC Rcd. 21697 (1999).

In Minnesota Petition, the State of Minnesota issued an RFP and later awarded a contract under which the winning bidder committed to construct 1,900 miles of fiber optic transport capacity throughout the State and to provide the State with a portion of that capacity. Minnesota’s stated plan was “to use these facilities to implement an intelligent transportation system and carry state government communications.” Minnesota Petition, ¶ 1. In return, the state awarded exclusive physical access to longitudinal rights-of-way along its interstate freeway system. Id. Applying Section 253, the Commission concluded that the phrase “State or local statute or regulation, or other State or local legal requirement” in section 253(a) was meant to be interpreted broadly. Minnesota Petition, ¶ 18. It went on to explain that, even though an agreement is not a statute or regulation, the Agreement awarded in that case gave the winning party exclusive physical access to rights-of-way. As part of the contract the State was legally

barred from permitting other entities access to these rights-of-way. Id. The Commission therefore found that the Agreement between Minnesota and the winning party created a legal requirement under Section 253(a) that prevented the State from granting access to potential competitors. Id. at ¶ 20. The Commission explained that Congress would not have included the phrase “other legal requirements” within the section if it had not recognized the potential dangers to competition that could come from other means than just statutes and regulations. Id. ¶ 18. “Section 253,” it stated, was meant to capture a broad range of state and local actions that prohibit or have the effect<sup>4</sup> of prohibiting entities from providing telecommunications services.” (Emphasis added). “Interpreting the term ‘legal requirement’ broadly,” it held, “best fulfills Congress’ desire to ensure that states and localities do not thwart the development of competition.” Id.

The procurement scheme and the resulting contract awarded to US West are similar in impact to the contract at issue in Minnesota Petition. As in that case, no state or local statute or regulation is at issue. However, as in Minnesota Petition, the State’s actions imposed a legal requirement that there be a single contract award. Minnesota Petition, ¶ 5. In other words, it “legally binds the State to deny other entities” the right to contract with the state to provide ANAP services. Id. at ¶ 17<sup>5</sup> In this case moreover, the State of Colorado not only mandated the award of a single contract to construct and operate 70 separate ANAPs (thereby foreclosing the entry of multiple providers), it approved a flat statewide pricing structure under the contract

---

<sup>4</sup> In Minnesota Petition, the party awarded the contract was providing facilities, not telecommunications services to the State. ¶ 6; ¶ 13. Nonetheless, the Commission stated that “[i]t is the Agreement’s effect on the provision of telecommunications service that is critical, not whether the Agreement would be characterized as dealing with infrastructure development.” Id., ¶ 14 (emphasis added).

<sup>5</sup> The fact that the contract was awarded as part of an open procurement process, moreover, does not negate its negative competitive impact. Minnesota Petition, ¶ 51. (“We do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their effect on the theory that the non-neutral requirement was somehow imposed in a neutral manner.”)

(subsidizing the winning contractor's service to rural areas). Thus, Colorado's actions at issue here impose legal requirements and come within the scope of Section 253. As discussed in more detail *infra*, these legal requirements (1) "may prohibit *or have the effect of* prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" (Section 253) and (2) impose "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services, or in the provision of parts or services to providers of telecommunications services and information services (Section 257)." The restrictions moreover, would not be useful, much less necessary, to "preserve and advance universal service, protect public safety and welfare or ensure the continued quality of telecommunications service" or to "safeguard the rights of consumers" under Section 253(b). On the contrary, Colorado's actions thwart these objectives.

A. The contract will deprive Amigo.Net and other competitors of the ability to provide telecommunications services to the public.

However well-intended, Colorado's current RFP structure is inimical to the Telecommunications Act goals of universal service without implicit subsidies and the promotion of vigorous competition among telecommunications companies, large and small. Driving the process has been an apparent misperception regarding the economic feasibility of deploying ANAPs in rural areas without a subsidy. ("Flat rate pricing could be the only way that the rural areas can afford advanced services." Attachment 4).

Colorado may believe that advanced telecommunications services will not reach rural consumers, businesses and government offices in Colorado if these services are not subsidized or if it cannot encourage telecommunications behemoths to bid. It is, however, simply wrong.

Amigo.Net attempted, without success, to impress upon Colorado that it can and *does* provide various advanced telecommunications services to rural Coloradans without any subsidy.

When it first communicated with Colorado about the ANAP bid last summer Amigo.Net was offering DSL services in the rural towns of Salida, Monte Vista, Alamosa, Pueblo and Meeker. By the end of last year, it was offering DSL, T-1 and frame relay services in Leadville and in several other locations. Amigo.Net also offers high speed wireless services throughout the San Luis Valley. Again, all of these services are provided without any subsidies. Other companies in rural Colorado are also deploying DSL and wireless solutions. See Attachment 8, Affidavit of Ken Swinehart.

How does Colorado's present plan to secure ANAP services through a single source (or a consortium bidding as a single supplier) and to condition the contract on the availability of an averaged single, statewide ANAP rate, cause competitive harm? The point might best be illustrated with an example.

Suppose, for illustrative purposes, that if one totaled the costs of constructing the planned 70 ANAPs contained in the winning bid of Company A under the RFP, the average cost was \$1 million. Suppose further that, under that same winning bid, the average cost of an ANAP in the Denver area was \$500,000 and that half of the State's ANAPs were located in the Denver area. This would mean that the average cost of an ANAP in all other areas of the State would be \$1.5 million, or three times the cost of an urban ANAP. Suppose, finally, that Company B, a company too small to "assume the capital investment required to build, operate, and maintain a statewide network infrastructure," (Attachment 5, RFP at 30) can construct an ANAP in a rural area for \$1.25 million -- less than Company A's (i.e., the winning bidder's) cost of the ANAP for the same location. Two uneconomic outcomes result.

First, because the State accepts a single bid, it loses the benefit of multiple bids at each proposed ANAP location, perhaps paying more, in total, than had it contracted separately for

each ANAP.<sup>6</sup> The State itself described the legislation leading to its RFP process as a bill mandating the state to “investigate and select one *or more* multiple use networks.” Attachment B. Colorado, however, has chosen an award of a single bid – the “most restrictive means available” – (New England Preemption Order at ¶ 21) to secure a statewide network infrastructure for deployment of advanced telecommunications services.

Second, competition is impeded because ANAP customers in rural areas would logically pay a rate reflecting the average cost of \$1 million, even though the actual costs of Company A (the winning bidder) were significantly higher than those of Company B. Company B’s entry is blocked by artificial pricing constraints created by the bidding requirements in the RFP. Rural communities and urban communities are harmed too, because the State’s bidding mechanism has encouraged uneconomic construction in order to subsidize service to rural residents at the

---

<sup>6</sup> Colorado might have believed that getting a single bidder helped secure a lower overall competitive bid, but this assumes that there are some special economies in building multiple ANAP. Amigo.Net does not believe this to be so. Each ANAP is geographically separate from other ANAPs and Amigo.Net is unaware of any material scale economies available to would-be ANAP providers if they are able to bid, for example on an ANAP in Boulder and in Alamosa, as opposed to bidding solely to build the Alamosa ANAP. See Attachment 8, Affidavit of Ken Swinehart. In any event, the economies, if they exist at all, have been offset by the sharp decline in the number of bidders the State ultimately saw, given that each bidder had to have sufficient size and capital to build all 70 ANAPs. It is axiomatic that as the number of bidders increases, the likelihood of lower bids increases. The largest economies come, not from bids to build multiple ANAPs, but from the benefits of aggregating load at *each* ANAP -- the so-called “anchor tenant” concept. It is the government’s ability to pool its demand for telecommunications service in each community -- among schools, police stations, courts, government offices, etc. -- that gives it leverage to encourage the construction of ANAPs. The RFP includes statements that, as part of the bid evaluation process, “the State will be assessing the Offeror’s understanding of local issues and the environment” and that it “will view the use of local partnerships and subcontractors . . . as a means of demonstrating local understanding.” (Attachment 5, RFP at 30). These promises, however, did nothing to preserve competition in the provision of ANAP services -- competition that would both enhance efficiency *and* allow contractors with “local understanding” to provide advanced telecommunications services directly to the State.

Indeed, as mentioned previously, the IDIQ contracting format is especially amenable to the award to several contractors, who may then be required to compete against each other on “mini-proposals” for work at different locations. This would have ensured the highest degree of price and quality competition in a multi-ANAP environment where the technical solution at each location may be different.



expense of both urban residents and rural telecommunications companies and their employees<sup>7</sup>.

In the long term, the harm is even greater because, by discouraging the entry of small, but efficient competitors, the State has possibly foreclosed future innovations by new market entrants that might bring benefits to rural consumers.

- B. The contract has an especially harsh impact on small businesses otherwise able to provide telecommunications and information services economically and efficiently and contravenes Section 257 of the Communications Act.

The RFP under which USWest was awarded the Colorado statewide contract required the bidders to have the ability to “assume the capital investment required to build, operate, and maintain a statewide network infrastructure,” (Attachment 5, RFP at 30). By definition, such a requirement excluded entities like Amigo.Net, who did not have the financial wherewithal to meet such a requirement, but who would have been able to bid on the construction of and provision of advanced telecommunications services from, individual ANAPs. See Attachment 8, Affidavit of Ken Swinehart.

Amigo.Net does not contend that the fact that Colorado awarded a single statewide contract was in and of itself antithetical to small business interests protected by Section 257 of the Act. On the contrary, Amigo.Net has already acknowledged that “there may be legitimate efficiency reasons that favor large-scale operation.” On the other hand, however, the efficiency of large scale operations cannot be presumed, as has been the case in Colorado’s bidding process.

---

<sup>7</sup> To be sure, the RFP did not ignore concerns about rapid deployment of advanced telecommunications services in rural areas -- it gave more weight to bids that promise earlier installation of ANAPs in rural communities. Attachment 5, RFP at 43. However, the RFP imposed no *requirement* that bidders adopt any particular sequence of implementation and ignores the potential benefits of soliciting bids to install ANAP capabilities at individual locations by dates certain.

The Commission is obliged to eliminate impediments to entry of small businesses that “significantly distort the operation of the market and harm consumer welfare.” In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 7 Comm. Reg. (P&F) 1112 (1997). In this case, as detailed in the attached affidavit of Mr. Swinehart, the award of a single contract is not required to promote efficiency. On the contrary, entities like Amigo.Net have constructed facilities and provided services from rural ANAPs and can do so efficiently and economically -- and without the need of subsidy -- if given the opportunity to do so. Attachment 8, Affidavit of Mr. Swinehart. By insisting on the award of a single contract, Colorado has diminished competition in the provision of ANAP services and has harmed small telecommunications providers without any showing either that (1) a single provider is the most efficient solution or that (2) small businesses like Amigo.Net are unable to provide advanced telecommunications services in rural areas economically.

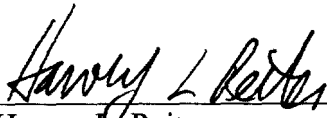
#### **IV. Conclusion**

For the aforementioned reasons, Amigo.Net respectfully requests that the FCC utilize its preemption power pursuant to Section 253(d) of the Telecommunications Act of 1996 and grant the petition for declaratory ruling finding that the Agreement between US West and Colorado is inconsistent with sections 253 and 257 of the Act. Given this Commission’s statements that it would look, not only at possible impediments created by its own regulations, but that it would read section 257 in tandem with its obligation under section 253 “to preempt state or local requirements that have the effect of prohibiting the ability of *any* entity to provide any telecommunications service,” Id. (emphasis added), it should invalidate the contract awarded to USWest. “The policy objectives set forth in the 1996 Telecommunications Act, in particular section 257(b),” this Commission stated, “make clear that the Commission must endeavor to

promote a marketplace in which decisions to diversify into various segments of the telecommunications marketplace are driven solely by sound business judgment, not regulatory constraints.” Id. at ¶ 107.

Respectfully submitted,

AMIGO.NET

By:   
Harvey L. Reiter  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K Street, N. W. Suite 600  
Washington, D.C. 20037  
(202) 393-5710

Its Attorney

Dated: July 5, 2000

G:\amigonet\plead\amigonet petition to FCC.doc

## **ATTACHMENT 1**

**STRATEGIC PLAN FOR A STATEWIDE  
TELECOMMUNICATIONS INFRASTRUCTURE**

**Table of Contents**

|  |           |
|--|-----------|
| <b>EXECUTIVE SUMMARY.....</b>                                | <b>1</b>  |
| <b>1.0 INTRODUCTION.....</b>                                 | <b>3</b>  |
| <b>2.0 OVERVIEW.....</b>                                     | <b>4</b>  |
| <b>2.1 The Authority.....</b>                                | <b>5</b>  |
| <b>2.3 The Solution.....</b>                                 | <b>7</b>  |
| <b>2.4 The Benefits.....</b>                                 | <b>8</b>  |
| <b>3.0 SITUATIONAL ANALYSIS.....</b>                         | <b>10</b> |
| <b>4.0 SOLUTION DETAIL .....</b>                             | <b>12</b> |
| <b>4.1 Demand Aggregation &amp; Anchor Tenant.....</b>       | <b>13</b> |
| <b>4.2 Private/Public Partnership(s).....</b>                | <b>14</b> |
| <b>4.3 Participation and Cooperation .....</b>               | <b>14</b> |
| <b>4.4 Central Coordination Authority.....</b>               | <b>15</b> |
| 4.4.1 Network Management.....                                | 16        |
| 4.4.2 Information Clearinghouse (Library and Expertise)..... | 16        |
| <b>4.5 Community Incentive Funding .....</b>                 | <b>17</b> |
| 4.5.1 Resource Centers .....                                 | 18        |
| <b>5.0 PROPOSED TECHNOLOGY.....</b>                          | <b>18</b> |
| <b>5.1 ANAP Services .....</b>                               | <b>19</b> |
| <b>5.2 ANAP Feeder Lines .....</b>                           | <b>20</b> |
| <b>6.0 IMPLEMENTATION STRATEGY.....</b>                      | <b>22</b> |
| <b>6.1 Funding Mechanism .....</b>                           | <b>23</b> |
| <b>7.0 OBSTACLES/BARRIERS.....</b>                           | <b>25</b> |
| <b>8.0 SUMMARY .....</b>                                     | <b>25</b> |
| <b>Glossary .....</b>  | <b>29</b> |

# ***STRATEGIC PLAN FOR A STATEWIDE TELECOMMUNICATIONS INFRASTRUCTURE***

## **EXECUTIVE SUMMARY**

The State of Colorado has a window of opportunity for the development of a statewide telecommunications infrastructure. Past network investments have provided beneficial solutions to the problems of the time; but these individual efforts alone are not adequate to meet today's integrated business needs. The State requires a fully developed, scaleable and coordinated statewide telecommunications infrastructure to provide the citizens of Colorado access to government services, educational opportunities and information resources they need to keep Colorado's economy competitive, locally and abroad.

Currently, Colorado is seen as a leader in high-tech jobs but lags in technology investment. There is a growing disparity between rural and urban communities. An ever widening "telecommunications gap" is leaving rural communities further behind and greatly impairing their ability to compete economically. Colorado desires a strong economy with solid growth; a statewide telecommunications infrastructure is a critical component in making this happen. Equitable and affordable access to such technology throughout the state will ensure our ability to meet this need and better position the state for future growth.

Based upon information provided by the Commission on Information Management approximately \$270 million in new information technology projects are scheduled to begin over the next two years. Many of these require advanced telecommunications services that are readily available in only a few areas of the state. As a result some of these projects are at risk of failing to fulfill their intended goals.

Without a coordinated telecommunications plan, state agencies, schools, libraries and institutions of higher education will continue to purchase telecommunications services in a piecemeal fashion. This often duplicates service in a community, or even the same building. Acquiring services in this manner slows development efforts by not providing sufficient incentive for the private sector to fund and build-out the needed infrastructure.

# ***STRATEGIC PLAN FOR A STATEWIDE TELECOMMUNICATIONS INFRASTRUCTURE***

## **1.0 INTRODUCTION**

The State of Colorado finds itself making isolated network investments without a fully developed (i.e., scalable and coordinated) network to meet the business needs of the State. This is a critical year for determining the future of Colorado's telecommunication infrastructure. Based upon information collected by the Commission on Information Management (IMC) through its annual planning process, approximately \$270 million in new State information technology projects are scheduled to begin during the next two years. These new projects and upgrades to current State systems have been designed with the presumption that advanced telecommunications services will be available wherever and whenever needed. This is not always the case. Based upon numerous discussions with individuals conducting business in rural Colorado, these advanced services are not available across the state; and those advanced services that can be obtained are often only available through the expense of "backhauling" the service to the nearest population center in which the service can be found. Backhaul charges may drive up circuit costs by a multiple of four or more times what it would cost if the service were available locally. Many projects have had to be scaled down or cost estimates dramatically increased due to the lack of local infrastructure in rural areas. These examples remind us that the best-planned projects can still be at risk of failure due to an infrastructure unable to support its requirements.

Without a coordinated telecommunications plan, state agencies, schools, libraries and institutions of higher education will continue to purchase telecommunication services in a piecemeal fashion. This often leads to needless duplication of service into a single community, or even to the same building, resulting in excessive costs that could have been avoided with a shared telecommunications network. Additional impacts of the current model are slowed infrastructure development, fragmentation of the State's ability to deliver services throughout Colorado and an increased risk of failure for new information technology projects.

This *Strategic Plan for a Statewide Telecommunications Infrastructure* is the mechanism that will prepare Colorado for the new millennium. Its goal is to fully develop a statewide telecommunications network through private/public partnerships, based on demand aggregation and the State's commitment to being an anchor tenant throughout the state. The benefit is to unify and concentrate efforts to ensure that maximum value is achieved in the shortest time. The following recommendations are submitted for consideration by the 1998 General Assembly.

1. Legislation mandating the participation of all state agencies, including higher education, in the aggregation of telecommunication circuits to optimize the economies of scale;
2. One-time capital funding of \$13.5 million to acquire Customer Premise Equipment to aggregate State circuits over a telecommunications infrastructure;
3. Spending Authority increase of \$7 million annually to fund ongoing private sector operation and management of the telecommunications infrastructure;
4. Three additional full-time equivalent positions to augment the Central Coordination Authority for the oversight and planning of the telecommunications infrastructure. This requires an additional \$161,000 of spending authority;
5. Establishment of a Community Incentive Funding program to enable communities to aggregate local demand and assist them in connecting to the statewide telecommunications infrastructure; and
6. Continued examination of alternative and innovative investment strategies to facilitate infrastructure development.

The benefits to be gained by implementing these recommendations are great, and so will be the challenges if the opportunity passes untouched. Someone once said "Imagine the possibilities." The time to make imagination a reality is now.



Upgrading the State's telecommunication infrastructure through the aggregation of existing and impending demand will provide many benefits to state agencies, schools, libraries and institutions of higher education. Access to increased capacity, expanded local services, and reduced costs, for comparable bandwidths, will be possible by maximizing the combined purchasing power of these groups with the State serving as an "anchor tenant". This role of "anchor tenant" along with private/public partnerships will provide incentives for telecommunications providers to develop infrastructure and accelerate the introduction of new technologies throughout the state, bringing economic development opportunities to traditionally under-served areas.

## 2.0 OVERVIEW

According to the Colorado Financial Reporting System (COFRS), the State of Colorado is currently spending approximately \$14 million annually for telecommunication services with the private sector (e.g., services, line charges, PBXs, moves & changes of circuits and telephones); and \$17 million annually for all other telecommunication expenditures (e.g., maintenance, capital equipment and non-capital equipment). No mechanisms or processes are in place to track or coordinate purchase of these services across agency or program boundaries for efficiency, advanced technology access, shared technology, or economies of scale. This *Strategic Plan for a Statewide Telecommunications Infrastructure* proposes, as its foundation, an aggregation of the State's currently fragmented telecommunications purchases. This will facilitate the State's role as a true "anchor tenant" in communities, and accelerate the implementation and availability of this critical infrastructure. The following recommendations are submitted for consideration by the 1998 General Assembly:

1. Legislation mandating the participation of all state agencies, including higher education, in the aggregation of telecommunication circuits to optimize the economies of scale;
2. One-time capital funding of \$13.5 million to acquire Customer Premise Equipment (CPE) to aggregate State circuits over a telecommunications infrastructure;
3. Spending Authority increase of \$7 million annually to fund ongoing private sector operation and management of the telecommunications infrastructure;

4. Three additional full time equivalent (FTE) positions to augment the Central Coordination Authority for the oversight and planning of the telecommunications infrastructure. This requires an additional \$161,000 of spending authority;
5. Establishment of a Community Incentive Funding program to enable communities to aggregate local demand and assist them in connecting to the statewide telecommunications infrastructure; and
6. Continued examination of alternative and innovative investment strategies to facilitate infrastructure development.

## **2.1 The Authority**

This plan is intended to fulfill the provisions of Senate Bill 96-102 (C.R.S. 24-30-1702.5) concerning the Statewide Information Infrastructure. The Commission on Information Management (IMC) is charged with the following tasks:

- To develop and implement requirements for the statewide information infrastructure based on present and future user applications;
- To review existing portions of the statewide information infrastructure to determine the areas of the state in which they exist and whether the existing portions are adequate and usable for present and future user applications; and
- To define and initiate a partnership between the private and public sector for funding and building the statewide information infrastructure, with the understanding that the private sector will build the necessary portions of the statewide information infrastructure.

Additionally, the plan will support the intent of Senate Bill 96-197 (C.R.S. 23-11.5-104), as relating to the investigation and selection of multiple-use networks for “enhanced instruction and information access.”

*(See Appendix A for a complete description of the recent history, legislation, and parallel efforts)*